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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 592

A. A. SPRAGUE, Receiver for the Chicago, North Shore and Milwaukee Railroad Company, *Petitioner*,

v.

J. ALBERT WOLL, United States Attorney for the Northern District of Illinois, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Now comes A. A. Sprague, receiver for the Chicago, North Shore and Milwaukee Railroad Company, and respectfully petitions this court to grant a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to remove therefrom, for review here, the record in No. 7608, wherein petitioner is appellant, and J. Albert Woll, United States Attorney for the Northern District of Illinois, and certain interveners, are appellees, and in which that court announced its opinion, not yet reported

on July 22, 1941 (R. 574), in which it affirmed the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 551), and states:

1. On August 16, 1939, petitioner filed a petition in the United States District Court for the Northern District of Illinois, Eastern Division, in which it sought an injunction against the United States Attorney for that district to restrain him from prosecuting any suit or other action against petitioner for violations of the Railway Labor Act (R. 2-42). During the pendency of the injunction proceedings in that court there were a number of interventions by parties claiming to be interested therein: the Interstate Commerce Commission by petition intervened and became a party; Division 900 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, a labor organization with which petitioner has, for many years, had labor contracts, intervened and became a party; the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen intervened by filing their appearances by counsel. Answers were filed by the defendants (R. 42-46; 63-70; 73-75).

The case involves decisions of the Interstate Commerce Commission. One of these proceedings involved the question whether the petitioner is subject to the Railway Labor Act. The other proceeding involved the reopening of the Railway Labor Act case and its consolidation with proceedings arising under the Railroad Retirement Act of 1937 and its companion act, the Carrier's Taxing Act of 1937. The hearing in the District Court was on the petition and answers, and the record of the two proceedings before the Commission.

2. The Railway Labor Act, after defining the term "carrier" contains the following provision:

> "* * * *Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a

part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

The exempting language of the Railroad Retirement Act of 1937 and of the Carriers' Taxing Act of 1937, is identical with the exempting language of the Railway Labor Act, already quoted. (45 U. S. C. A. Secs. 228a and 261).

In January, 1933, this court held that petitioner was an interurban electric railway, as that phrase is used in Section 20a of the Interstate Commerce Act. (49 U. S. C. A. Sec. 20a) *United States* v. *Chicago North Shore and Milwaukee R. Co.*, 288 U. S. 1.

3. On November 7, 1936, in Railway Labor Act Docket No. 7 (219 I. C. C. 135), the Interstate Commerce Commission, upon the request of the National Mediation Board, after hearing, determined that the petitioner is an interurban electric railway which falls within the exemption proviso of the Railway Labor Act (R. 20-27). In that proceeding Division 900 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, representing the employees of the petitioner, intervened and urged that the Commission determine the petitioner to be an interurban electric railway. (R. 133-136; 165-167). In October, 1937, the same employee organization filed a complaint with the Commission requesting it to decide that petitioner is subject to the Railroad Retirement Act of 1937. Later, the Commissioner of Internal Revenue requested the Commission to make a determination of the status of the petitioner under the Carriers' Taxing Act of 1937. As the result of the complaint of the employees and of the request of the Commissioner of Internal Revenue, the Commission

instituted a proceeding known as Electric Railway Docket No. 2.

4. On February 25, 1938, the Commission by order purported to reopen Railway Labor Act Docket No. 7, on its own motion, for further hearing in connection with Electric Railway Docket No. 2 (R. 195-196). The Commission did not, by that order or by any subsequent order, affirmatively vacate or set aside its determination of November 7, 1936, made in Railway Labor Act Docket No. 7. Over the objection of petitioner the two dockets were later consolidated and heard together on a common record (R. 203-204). As a result of the consolidated hearing the Commission, on July 11, 1939, determined (234 I. C. C. 13) that petitioner did not fall within the terms of the exemption proviso of the Railway Labor Act, the Railroad Retirement Act of 1937, or the Carriers' Taxing Act of 1937 (R. 522-536).

5. The errors relied on by petitioner arise out of the action of the Interstate Commerce Commission in purporting to rehear and reconsider its determination of November 7, 1936, in the Railway Labor Act case, out of its determination of July 11, 1939, in which it held that the petitioner does not fall within the exempting language of the Railway Labor Act, and out of the action of the court below in affirming the judgment of the District Court which sustained the Commission and refused, permanently to enjoin the defendant, the United States Attorney.

6. Since September 30, 1932, the properties of the Chicago, North Shore and Milwaukee Railroad Company, hereinafter sometimes called the "North Shore," have been operated by petitioner under receivership proceedings (R. 130 and 350). These properties have developed through various transfers and reorganizations, out of a street railway company, organized more than thirty years ago (R. 124-125; 344-345). The North Shore is operated by electric power. It operates a passenger service between Roosevelt Road, in Chicago, Ill., and 6th and Michigan Streets, Mil-

waukee, Wis., a distance of 85 miles (R. 101, 241, 353 and 354). Approximately 77 per cent of the total revenue from transportation services of the North Shore is derived from the carriage of passengers; the remainder of such revenue is derived from the carriage of freight of various kinds (R. 19, 118, 337, 479-493). About 14 per cent of the total revenue from transportation services is derived from carload freight (R. 479-493).

7. The North Shore operates in and out of Chicago over the elevated tracks of the Chicago Rapid Transit Company as far south as Roosevelt Road and as far north as the northern boundary of Evanston, Illinois, a suburb to the north of Chicago. These tracks are used by the trains of the North Shore in common with the trains of the Chicago Rapid Transit Company. The latter company performs the local passenger elevated transportation service in Chicago (R. 355-356). From Howard Street, which is the boundary between Chicago and Evanston the operations of the North Shore are over two routes; one is called the Shore Line, which continues north through Evanston, Wilmette, and other intermediate suburbs and municipalities, to North Chicago Junction, and the other is called the Skokie Valley Line which extends westerly to Niles Center and thence north through Skokie Valley to North Chicago Junction, where the two lines join and proceed north to Milwaukee. (R. 101, 241, 354-356). A branch line extends from Lake Bluff, Illinois, westerly through Libertyville to Mundelein, Ill. (R. 101, 241, 354). From North Chicago Junction there is a branch line extending northeasterly through North Chicago to the business center of Waukegan, Illinois, the main-line continuing north from North Chicago Junction through the westerly portion of North Chicago and Waukegan, thence through Zion, Winthrop Harbor, Kenosha, Racine to Harrison Street, Milwaukee, Wisconsin. From Harrison street, Milwaukee, to the terminal in down-town Milwaukee, the operation is over the tracks of the Chicago and Milwaukee Electric Railway Company, a local street car

company in Milwaukee, the stock of which is owned by the North Shore. Local street car and bus services are also performed by the North Shore in Waukegan, Illinois.

8. In Milwaukee no carload freight may be handled over the tracks of the Chicago and Milwaukee Electric Railway Company (R. 119, 120-121, 211, 375), which company is used as a passenger terminal entrance by the North Shore from Harrison Street to the down-town passenger station at 6th and Michigan Streets, Milwaukee. (R. 103, 242, 356). On the Shore Line carload freight cannot be handled south of Highland Park, Ill. (R. 123, 211), but on the Skokie Valley line carload freight can be handled by the use of gauntlet tracks between Buena Park, within the corporate limits of Chicago, and Harrison Street, Milwaukee. (R. 211, 262). In Chicago no carload freight and no standard steam railroad freight equipment can be handled by the North Shore south of Buena Park, at which point there is an interchange connection with the Chicago, Milwaukee, St. Paul & Pacific Railway Company (R. 375). This connection exists by reason of the fact that the North Shore and the Chicago Rapid Transit Company jointly operate over the former Evanston Division of the Chicago, Milwaukee, St. Paul & Pacific Railroad, under leases and contracts approved by the Illinois Commerce Commission (R. 377-379). All carload business of the North Shore which is handled between Buena Park and Howard Street over the Evanston Division, is by sufferance of the Milwaukee railroad and not as a matter of right. (R. 378-379). Moreover, the interchange of carload freight with the Milwaukee railroad at Buena Park is, as explained by Witness Fallon, executive officer for the petitioner, under special conditions and is circumscribed and limited. (R. 377-381).

The North Shore has a freight terminal at Harrison Street, within the city limits of Milwaukee, at which carload and less-carload freight may be handled (R. 262); but the North Shore does not have any interchange track connection with any steam railroad at Harrison Street or at

any other point within the City of Milwaukee. (R. 376, 381.).

Approximately 19 per cent of the total route miles of the North Shore cannot be used for the transportation of freight in standard steam railroad freight equipment. (R. 375-376). The North Shore interchanges freight and participates in joint through freight rates with steam railroads. (R. 118).

9. Under the President's Proclamation of December 28, 1917, all railroads engaged in general transportation, whether operated by steam or electric power, except street, suburban and interurban electric railways, were taken over by the Government. The North Shore was not taken under Federal Control under that Proclamation, or otherwise.

10. All of the outstanding securities of the North Shore were issued under the authority and approval of the regulatory commissions of Illinois and Wisconsin, with the exception of one series of its first and refunding mortgage bonds, which were approved by the Interstate Commerce Commission during the pendency of the appeal of the suit which resulted in the decision of this court in *U. S.* v. *C. N. S. & M. R. Co.*, 288 U. S. 1, in which case this court sustained the decree of the District Court of the Northern District of Illinois, Eastern Division, which held that the North Shore was an interurban electric railway as that term is used in Section 20a of the Interstate Commerce Act. The effect of that decision was to deny jurisdiction of the Interstate Commerce Commission over the issuance of securities by the North Shore. The fact that the securities of the North Shore have been issued with the approval of the administrative commissions of Wisconsin and Illinois, has regularly and continuously been made known to the Interstate Commerce Commission in the annual reports of the North Shore to that Commission (R. 126 and 347). Since January, 1933, the Illinois Commerce Commission is the only regulatory body which has exercised authority to approve the issuance of petitioner's certificates and other securities issued by the petitioner, the regulatory commission of Wis-

consin having disclaimed jurisdiction since that time. (R. 130).

None of the securities of the North Shore are owned by any steam railroad (R. 130, 350-351). The North Shore is not operated as a part of any steam railroad system of transportation. It is an independently owned and independently operated electric railway, which performs an interurban, suburban and street car service (R. 130 and 350).

11. Since the decision of this court in the North Shore Securities case, in January, 1933, there has been no material change in the physical or functional characteristics of the North Shore (R. 131 and 382; also Ex. No. 1 at 141-163). The operation of the North Shore over the elevated structure in Chicago, between Roosevelt Road and 63rd Street, on the south side of Chicago, as well as the operation of some of the street car service in Waukegan, has been abandoned since 1933 (R. 101, 248 and 354). The number and location of interchange points with steam railroads has not been increased (R. 131, 147). The percentage of passenger and freight revenues to total revenues has been practically constant each year since 1930 (R. 19, 339, 479-493). (Ex. Nos. 51-A-58-A), although there has been a substantial decrease in the revenue from freight traffic since 1930 (R. 340). This is vividly illustrated by the appendix attached hereto, which is based on exhibits shown at Pages 479 to 493 of the printed record.

The reasons relied on for the writ are:

FIRST—The decision of the court below is contrary to the decision of this court in *U. S.* v. *Chicago, North Shore and Milwaukee R. Co.*, 288 U. S. 1; *Piedmont and Northern Ry. Co.*, v. *Interstate Commerce Commission*, 286 U. S. 299; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 127; and is not in harmony with the decision of the Circuit Court of Appeals, Second Circuit, in *Hudson & Manhattan* v. *Hardie*, 103 F. (2nd) 327; Certiorari denied 307 U. S. 640.

SECOND—When the Interstate Commerce Commission, on November 7, 1936, determined, at the request of the Na-

tional Meditation Board, as provided in the Railway Labor Act, that the North Shore fell within the exemption provisions of that act, the authority of the Commission was exhausted, and the Commission had no right or authority thereafter, on its own motion, to reopen the case and to consolidate it for further hearing with other cases, as no administrative authority is conferred on the Commission by the Railway Labor Act. Nor does that Act confer any authority upon the Commission to determine, upon its own motion, whether a particular electric railway falls within the exemption proviso thereof. The determination by the Commission was not an order. *Shannahan, et al.*, v. *United States*, 303 U. S. 596. Unlike the Interstate Commerce Act, which confers authority upon the Commission to institute investigations on its own motion, as to any matter or thing concerning which a *complaint* is authorized to be made, the Railway Labor Act contains no such provision (49 U. S. C. A. Sec. 13(2). Even under the Interstate Commerce Act, where the Commission is authorized to suspend or modify its own orders upon such notice and in such manner as it shall deem proper, its authority is limited to an order still under its control. *Louisville & Nashville R. R. Co.* v. *Sloss-Sheffield Steel and Iron Co.*, 269 U. S. 217, at 225.

THIRD—On February 25, 1938, the Commission, by order, purported to reopen Railway Labor Act Docket No. 7, on its own motion, without application or complaint from anyone, for further hearing in connection with Electric Railway Docket No. 2 (R. 195-196). The Commission did not by that order or by any subsequent order, affirmatively vacate or set aside its determination of November 7, 1936. The order of February 25, 1938, is null and void, and the action of the Commission thereunder in consolidating Railway Labor Act Docket No. 7 with the other docket for hearing, is unlawful, arbitrary and capricious.

FOURTH—The determination of the Interstate Commerce Commission of July 11, 1939, as the result of the consolidated hearing, that the North Shore is subject to the

Railway Labor Act, is contrary to its first determination, contrary to the decision of this court, is arbitrary, capricious, contrary to applicable rules of law, and contrary to the evidence.

FIFTH—The determination of the Interstate Commerce Commission of July 11, 1939, is void because facts and circumstances were considered by the Commission which could not legally influence its action. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Florida East Coast R. Co.* v. *United States*, 234 U. S. 167, at 188. The report of the Commission of July 11, 1939, contains a finding to the effect that the position of the labor organization, complainant in the Railroad Retirement Act case, was different from the position taken by the same labor organization in the *Railway Labor Act* case (R. 526, 234 I. C. C. 13). The report also contains a finding that the steam railroad Brotherhood labor organizations had intervened since the first hearing and had contended that the North Shore did not fall within the exemption proviso of the Railway Labor Act (R. 526). The Commission was improperly influenced by the beneficial results to be obtained for the employees under the Railroad Retirement Act (R. 536). The Commission had no right to permit itself to be influenced to any extent by the identity or the importance of the parties concerned, nor by the desire of one party over that of another, nor by any results, which, in the opinion of the Commission, might be beneficial or otherwise.

SIXTH—The determination of the Commission in its report of July 11, 1939, that the North Shore is not a street, interurban or suburban electric railway within the exemption proviso of the Railway Labor Act and that it is operated as a part of the general steam railroad system of transportation, is contrary to the statute and is arbitrary and capricious.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

this Honorable Court, directed to the United States Court of Appeals, Seventh Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, 7608, A. A. Sprague, Receiver for the Chicago, North Shore and Milwaukee Railroad Company, petitioner-appellant, v. J. Albert Woll, United States Attorney for the Northern District of Illinois, respondent-appellee, and that the said judgment of the United States Court of Appeals, Seventh Circuit, may be reversed by this Honorable Court, and that your petitioner have such other relief in the premises as this Honorable Court may seem meet and just; and your petitioner shall ever pray.

A. A. SPRAUGE,
Receiver for Chicago, North Shore and Milwaukee Railroad Company,

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